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No. 83-875

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

WANDA WRIGHT SCHAAB - - - Petitioner

versus

MARIE SCHAAB and
ARLENE M. GITTINGS - - - Respondents

On Petition for Writ of Certiorari
to the Supreme Court of Kentucky

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Following a two week trial, the jury returned a verdict invalidating a propounded Will of Carl N. Schaab on the grounds of the Petitioner's undue influence.[1] The State trial court entered Judgment upon the verdict, and Petitioner attempted to appeal the Judgment. Respondents moved the Kentucky Court of Appeals to dismiss the appeal on procedural grounds, which motion was granted. Petitioner's motions to reconsider were denied. Petitioner moved the Kentucky Supreme Court for discretionary review, which motion was denied.

In terms of this Court's jurisdiction on writ of certiorari, the only question presented is whether the dismissal of Petitioner's appeal on procedural grounds violates the guarantee of due process under the 14th Amendment.

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[1]The parties in the Will contest proceeding were Wanda J. Wright, a/k/a Wanda Wright Schaab, proponent of the subject Will, and the intestate heirs at law of Carl N. Schaab and legatees under a prior Will who all joined as contestants of the Will, being namely, Marie Schaab, Arlene M. Gittings, Raymond Schaab, Frank Schaab, Fred Schaab, Melvin M. Jacquat, Glen E. Jacquat, Franklin H. Jacquat, Mildred Maxey, Harriet E. Jacquat, Joan Schaab, Bernice Liebel, Eugene Schaab, LaVerne Bittner, Martha West, Oren Schaab, Verda McKeon, Marguerite Waldschmidt, Katherine Asay and Louis Thurman.

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WANDA WRIGHT SCHAAB - - - *Petitioner*

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MARIE SCHAAB and
ARLENE M. GITTINGS - - - *Respondents*

On Petition for Writ of Certiorari to the Supreme Court of Kentucky

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Because of inaccuracies and omissions, Respondents must correct Petitioner's Statement of the Case. The crux of Petitioner's complaints before this Court center upon the dismissal of her appeal by the Kentucky Court of Appeals. Accordingly, attention here shall be limited to analysis of the appellate process. Appendixed hereto are the material motions and responses which resulted in the appellate court *Orders* included in Petitioner's Appendix.

The Petitioner attempted to appeal that part of a Judgment which held a propounded Will of Carl N. Schaab to be invalid. The jury, after a two week trial, found the Petitioner to have exerted undue influence

over Carl N. Schaab in executing the propounded Will less than 72 hours before his death at age 85. The trial court's Judgment, which was entered December 7, 1981, is set forth herein as Appendix A, Page 13. As referenced in her *Petition* (page 3), the appellate process was initiated by three Notices of Appeal. The first was prematurely lodged with the trial court clerk on December 29, 1981 when Petitioner still had pending before the trial court motions to vacate Judgment and motions for new trial. After these post-Judgment motions were overruled following a hearing on January 6, 1982, the Petitioner filed a second or an "Amended Notice of Appeal" on January 12, 1982.

The third Notice of Appeal was filed after the trial court, following an evidentiary hearing, denied the Petitioner's request to prosecute her appeal *"in forma pauperis."* The appeal of the trial court's denial of *forma pauperis* status gave rise to an immediate review by the Kentucky Court of Appeals as dictated by *Gabbard* v. *Lair,* Ky., 528 S. W. 2d 675 (1975). After twice reviewing the record, the Kentucky Court of Appeals by Order dated April 14, 1982 denied the Petition for Relief from the denial by the trial court of the motion to proceed in *forma pauperis.* Appendix B, Page 15.

The appellate review of *forma pauperis* status stayed or held in abeyance any procedural time limits on the Petitioner's appeal of the Will contest Judgment. However, after April 14, 1982 no further steps were taken until the undersigned, on May 4, 1982, moved to dismiss the appeal. The *Motion to Dismiss Appeal* is set forth in Appendix C, Page 17, hereto, and

sets forth seven specific procedural rules with which Petitioner had not complied. No response was made to this motion. However, on May 5, 1982, the Petitioner, by her then counsel of record, paid the filing fee for the appeal and submitted a *Motion for Extension of Time* (Appendix D, Page 20) to designate and certify the stenographic trial record. A response to this motion was filed by the undersigned (Appendix E, Page 23) and on June 10, 1982, the Kentucky Court of Appeals issued its Order (Petitioner's Appendix, Page 11) dismissing the appeal and denying the motion for extension of time.

The Petitioner, by separate attorney, filed two separate *Motions to Reconsider*. Appendix F, Page 28 and Appendix G, Page 30. Responses were filed to both motions. Appendix H, Page 31 and Appendix I, Page 33. By Order dated December 2, 1982 (Petitioner's Appendix, Page 12), the Motions for Reconsideration were denied. Thereafter, on December 21, 1982, Petitioner filed with the Kentucky Supreme Court a *Motion for Discretionary Review* of some 67 pages including exhibits. A response to the motion was filed (Appendix J, Page 35) and by *Order* dated June 30, 1983 (Petitioner's Appendix, Page 13) discretionary review was denied.

SUMMARY OF ARGUMENT

Petitioner asserts that the dismissal of her appeal on the "technicality of a procedural rule" is a denial of due process. It is the Respondents' contention that the constitutional guarantee of procedural due process

affords only the opportunity to be heard. The procedural rules proscribing the manner by which a litigant exercises the right to be heard are a subject of regulation by the state. The Supreme Court of Kentucky has adopted the rules by which litigants may seek appellate review and the right to appellate review is conditioned upon compliance with the rules. The Petitioner admits that she did not comply with the rules. The Petitioner does not allege or argue that the rules under which her appeal was dismissed are unconstitutional or that they were applied to her in an arbitrary or unreasonable manner. The Petition does not present a federal question of substance and the cause should not be reviewed on certiorari.

ARGUMENT

THE KENTUCKY COURT OF APPEALS' DISMISSAL OF APPEAL ON PROCEDURAL GROUNDS DOES NOT PRESENT A FEDERAL QUESTION OF SUBSTANCE WARRANTING CERTIORARI JURISDICTION.

A. Procedural Rules for Appellate Review Are a Subject of State Regulation and Control.

The fundamental right guaranteed by the due process clause is the opportunity to be heard. The manner or procedure by which the opportunity to be heard is exercised in the courts of the individual states is a matter of regulation and control by the individual states. The opinion in *Bute* v. *Illinois,* 333 U. S. 640, 68 S. Ct. 763, 92 L. Ed. 986 (1948) recognized the historical formation of each state's own forms of due process of law and held that:

> "A substantial presumption arises in favor of, rather than against, the lawfulness of those procedures and in favor of their right to continued recognition by the federal government as 'due process of law.' "

The Kentucky Supreme Court has promulgated Rules of Civil Procedure which govern the manner in which appeals are taken. (Kentucky Rules of Civil Procedure, Civil Rules 73 through 76.) These rules embody procedural "due process of law" in the Courts of Kentucky.

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury or a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense. . . . Nor does the equal protection clause exact uniformity of procedure." *Dohany* v. *Rogers,* 281 U. S. 362, 50 S. Ct. 299, 74 L. Ed. 904 (1930).

Likewise, it has been long held that "the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.,* 284 U. S. 151, 52 S. Ct. 69, 76 L. Ed. 214 (1931).

With this overview of procedural due process, it is easily seen that Petitioner was afforded "the opportunity to be heard." The Petitioner admits that her appeal was dismissed on procedural grounds. Petitioner does not claim that these rules were applied to

her in an arbitrary or discriminatory manner, nor does she challenge the constitutionality of any rule itself. Petitioner advances no authority for her assertion that the dismissal of an appeal on procedural grounds is a denial of the due process opportunity to be heard. Examination of the motions and responses which detail the particular Civil Rules not complied with in the present case, as well as the manner in which those Rules are applied by the Kentucky Appellate Courts, clearly shows that there is no due process issue for review in this case.

B. The Petitioner's Right to Appellate Review by the Kentucky Court of Appeals Is Conditioned Upon Strict Compliance With Kentucky's Rules of Civil Procedure.

The highest Court in Kentucky has consistently held appellants to the standard of strict compliance with the Civil Rules, the most recent pronouncement being in *Foremost Insurance Co.* v. *Shepard,* Ky., 588 S. W. 2d 468 (1979) which held:

> "It is our opinion, however, that the right of appeal guaranteed by Section 115 may be conditioned upon strict adherence to orderly rules of procedure. 'Substantive rights, even of constitutional magnitude, do not transcend procedural rules, because without such rules those rights would smother in chaos and could not survive.' *Brown* v. *Commonwealth,* Ky., 551 S. W. 2d 557, 559 (1977)."

Rule 76.34(6) of the Kentucky Rules of Civil Procedure specifically provides that an appeal may be dismissed for failure to proceed "in conformity with

the rules". Pursuant to CR 76.34(6) Respondents' Motion to Dismiss Appeal (Appendix C, Page 17) set forth seven different procedural violations by the Petitioner in her attempt to seek appellate review of the Judgment. (It should be noted that before her appeal was dismissed, Petitioner did receive a separate appellate review of the trial court's denial of her request to proceed *in forma pauperis* on her appeal. Appendix B, Page 15. In accordance with due process as set forth in the rule of *Gabbard* v. *Lair,* Ky., 528 S. W. 2d 675 (1975) the Petitioner's appeal on the merits was held in abeyance pending review of the forma pauperis issue.) As the Court of Appeal's *Order* reflects (Petitioner's Appendix, Page 11), no response was made to the Motion to Dismiss. Petitioner was given the opportunity to be heard, an opportunity to respond to each specific rule violation, but failed to do so. By counsel, the Petitioner's only "Response" was a Motion for Enlargement of Time within which to designate and certify the trial court record. (Appendix D, Page 20.) A Response to this motion Appendix E, Page 23) specifically set forth the facts and authorities dictating dismissal of the appeal for failure to designate the record alone, regardless of the other procedural violations. The issues thus being joined, the Court of Appeals granted the Motion to Dismiss the Appeal and denied the Motion for Enlargement of Time. The Petitioner obliquely asserts that the only reason her appeal was dismissed was her admitted failure to include all necessary parties in her Notice of Appeal. The motions before the Court of

Appeals and its Order of June 10, 1982 do not support the Petitioner's claim. The failure to timely file a designation of record and the denial of the belated Motion for Enlargement of Time alone were grounds mandating dismissal of the appeal. *Johnson* v. *Maloney's of Olive Hill, Inc.*, Ky., 569 S. W. 2d 704 (1978).

Furthermore, the Petitioner's assertion (Petition, Page 1) that the Court of Appeals "clarified their Order of June 10, 1982" is not supported by the record. Following dismissal of the appeal, Petitioner, by two separate attorneys, filed Motions for Reconsideration (Appendix F, Page 28 and Appendix G, Page 30). In seeking reconsideration of the Order dismissing the appeal, both motions advanced the singular argument now advanced here, that the appeal should not be dismissed for failure to include all necessary parties in the Notice(s) of Appeal because all necessary parties were not before the trial court. Response was made to both Motions for Reconsideration. (Appendix H, Page 31 and Appendix I, Page 33.) The Court of Appeals denied the motions by Order dated December 12, 1982. Contrary to Petitioner's belief, this Order (Petitioner's Appendix, Page 12) does not "clarify" or "admit" the grounds upon which her appeal was dismissed. The prepositional phrase, "for failure to include indispensable parties in the Notice of Appeal," clearly modifies and refers to "the Motions to Reconsider" which raised the issue and not "the Order Dismissing the Appeal" which stated no specific grounds other than, "no response to the motion having been filed."

As pointed out above, and as set forth in the motions and responses before the Kentucky Court of Appeals, the Petitioner's appeal was dismissed for failure to comply with numerous procedural rules, not simply her failure to include all parties in her Notice(s) of Appeal. Accordingly, the Petitioner's argument advanced here to seek review upon writ of certiorari is not even factually supported. Incongruously, the Petitioner admits on Page 4 of her Petition a ruling by the trial court that all necessary parties were before the trial court. The Petitioner continues to argue that ruling here, but the simple obvious reality is that appellate review of that ruling, as well as review of the jury's verdict and the Judgment, were all conditioned upon compliance with the Rules of Civil Procedure. This was plainly set forth before the Supreme Court of Kentucky in Response (Appendix J, Page 35) to Petitioner's Motion for Discretionary Review, which motion was denied.

The Petitioner argues that the dismissal of her appeal on "a technicality of a procedural rule" denied her due process. Such an argument was refuted by a well reasoned opinion in the analogous case of *Meyer* v. *Territory of Hawaii,* 164 F. 2d 845 (6th Cir. 1947), certiorari denied 333 U. S. 860, 68 S. Ct. 738, 92 L. Ed. 1139. In *Meyer,* the Hawaiian appellate court dismissed an appeal for rule violations relating to the form of the Appellant's Brief, and Meyer claimed denial of due process in the Federal Court. The opinion by the Ninth Circuit Court of Appeals analyzed the rule making power of the Supreme Court

of Hawaii, and recognized the limitations upon the authority of a federal tribunal to disturb a territorial (or state) court's interpretation and application of its own rules.

Just as in the present case, Meyer admitted failure to comply with the rules governing appellate review, the Court holding:

> "The Appellant strives to spell out a deprivation of his constitutional rights because the territorial court 'dismissed the writ on a mere technicality'. We do not agree. The Appellant does not argue, nor can he argue, that the rule itself is unconstitutional. As we have seen, he admits that he did not conform to a valid rule of the tribunal to which he was appealing. In our view, *that ends the case.*" (Emphasis added.) *Meyer, Supra,* p. 850.

The Petitioner does not demonstrate that the dismissal of her appeal was "a clear departure from ordinary legal principles" or that it was in any manner arbitrary or unreasonable. Due process, or the opportunity to be heard, in an appellate court is conditioned upon compliance with that Court's Rules. The Petitioner did not comply. As in *Meyer,*

> "It follows that no federal question of substance is presented by the appeal." *Meyer, Supra,* p. 851.

CONCLUSION

The issue presented by the Petition for Writ of Certiorari is whether the dismissal of the appeal on procedural grounds denied the Petitioner's due process opportunity to be heard. Pursuant to the facts, as evidenced by the motions and responses that presented the matter before the Kentucky Court of Appeals, the Petitioner clearly was not denied an opportunity to be heard. Pursuant to the authorities herein set forth, the dismissal of the appeal does not present a federal question of substance to merit review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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400 Marion E. Taylor Building
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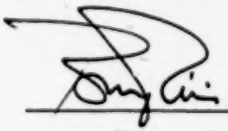
(502) 582-2277

Counsel for Respondents

CERTIFICATE OF SERVICE

In accordance with Rule 28.3, I certify that three copies of this Brief have been served by first class mail, postage prepaid, on January 13, 1984, to: Wanda Wright Schaab, 6405 Shadow Wood Drive, Prospect, Kentucky 40059; Louis Cohen, Esq., Curator of the Estate of Carl N. Schaab, Deceased, 200 South Seventh Street, Louisville, Kentucky 40202.



BRUCE A. NIEMI

APPENDIX

APPENDIX A

JEFFERSON CIRCUIT COURT

DIVISION 15

Civil Action Number 79-CI-04025

MARIE SCHAAB and
ARLENE M. GITTINGS, et al., - - - - *Plaintiffs*

v.

WANDA J. WRIGHT
a/k/a WANDA WRIGHT SCHAAB, - - *Defendant*

JUDGMENT

This cause came on for trial the 9th day of November 1981. The Plaintiffs were represented by Honorable Bruce Niemi and the Defendant represented herself. Both sides announced ready. The following jurors were duly seated and sworn:

David Osborne
Ernest Grant
Bobbie Roberts
Jeremiah Young
Juanita Bordier
Dorothy Minton
Susan Becker
Jane Coursey
Mary Dadds
Paula Dorsey
Dorothy Krause
Charlie Hall
Daniel Covington

The jury received evidence and the instructions of the Court: heard argument and after being reduced by the excuse of juror Daniel Covington retired to deliberate. In due course on the 20th of November the jury returned the following verdict:

"Instruction I"

We, the following jurors, find the will of Carl N. Schaab dated February 16, 1979 invalid because evidence indicates undue influence by Wanda Schaab.

David M. Osborne (Foreman)
Dorothy Krause
Jeremiah Young
Bobbie Roberts
Ernest L. Grant
Paula Dorsey
Susan Becker
Mary K. Dadd
Jane Coursey

"Instruction II"

"We, the following jurors, find the marriage between Carl N. Schaab and Wanda Schaab is a valid marriage because we cannot find sufficient evidence to indicate that Carl N. Schaab did not possess insufficient mental capacity to marry or was unduly influenced by Wanda Schaab to marry.

David M. Osborne (Foreman)
Dorothy Krause
Bobbie Roberts
Charlie O. Hall
Paula Dorsey
Susan Becker
Mary K. Dadds
Jane Coursey
Juanita Bordier

Wherefore, it is the judgment of the Court that the paper in evidence dated Februery 16, 1979 purporting to be the will of the deceased Carl N. Schaab is not the will of Carl N. Schaab and the marriage of Carl N. Schaab and the Defendant, Wanda Wright Schaab on December 29, 1978 was a valid marriage.

Costs are assessed one-half to the Plaintiffs and one-half to the Defendant.

Witness the hand of the Court this 3rd day of December 1981.

(s) C. V. Sanders
Special Judge, C. V. Sanders

APPENDIX B

COURT OF APPEALS OF KENTUCKY

No. 82-CA-515-MR

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal From Jefferson Circuit Court
No. 79-CI-0425

ORDER

BEFORE: LESTER, WHITE, and WILHOIT, JUDGES.

It appears to the Court that its order entered March 29, 1982, improvidently remanded this case to the circuit court based on the following facts:

Appellant's notice of appeal filed in this Court on March 10, 1982, states that the judgments or orders appealed from were entered January 6, 1982, and are found in the record on pages 126-128. On the page following page 128 is an order entered January 6, 1982, which sets a supersedeas bond in the amount of $25,000.00. On page 129 of the record is an order entered January 8, 1982, permitting appellant to proceed in forma pauperis except for the transcript of testimony. These are the orders upon which this Court based its order of March 29, 1982.

It has come to the attention of the Court that the January 8, 1982, order permitting appellant to proceed in forma pauperis except for the transcript was vacated by

order entered January 26, 1982. The trial judge on January 29, 1982, after a hearing, entered an order denying appellant's motion to proceed in forma pauperis. On this state of facts, it is clear to the Court that our order of March 29, 1982, remanding the case for specific findings relative to the circuit court's orders of January 6, 1982, and January 8, 1982, was improvidently granted, and it is hereby WITHDRAWN in its entirety. The following order is substituted therefor:

Appellant's petition seeking relief from the denial by the trial court of her motion to proceed in forma pauperis is hereby DENIED.

ENTERED: April 14, 1982

(s) Charles B. Lester
Judge, Court of Appeals

APPENDIX C

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025

MOTION TO DISMISS APPEAL

Appellees, pursuant to CR 76.34(6), move this Court to dismiss the above styled appeal on the grounds that the appeal has not been prosecuted in conformity with the rules. The specific rules having been violated are as follows:

1. CR 73.02(1)(b) — The filing fee required by Rule 76.42(2)(a)(i) has not been paid, and the Notice(s) of Appeal have not been properly filed and docketed.

2. CR 73.03 — The Notice(s) of Appeal fail to specify all necessary parties as Appellees. This is a will contest action in which the jury found a propounded will of Carl N. Schaab to be invalid because of undue influence by the Appellant. In addition to the Appellees named above the following 14 individual heirs at law of Carl N. Schaab were parties properly before the trial court; Raymond Schaab,

Frank Schaab, Fred Schaab, Melvin Jacquat, Glen E. Jacquat, Franklin H. Jacquat, Mildred Mavey, Harriet E. Jacquat, Joan Schaab, Bernice Liebel, Eugene Schaab, Laverne Bittner, Martha West, Oren Schaab. The verdict and judgment appealed from invalidated a will propounded by Appellant as a result of which the deceased's estate passes to his heirs under the laws of descent and distribution, therefore all of the heirs at law are indispensable parties to any appeal. The finality of the judgment as to these heirs omitted in the appeal is codified in KRS 394.260. Although all of these heirs are represented by the undersigned, CR 73.03 is mandatory and the omission of these indispensable parties prevents the Court from granting complete relief as prayed for in Appellant's appeal. In addition, the Appellant has omitted as a party to the appeal the personal representative of the deceased's estate, Mr. Louis Cohen, who was duly appointed curator of the estate pursuant to KRS 395.410. Finally, American Druggists Insurance Co., surety on Appellant's bond posted in the trial Court for sums of the deceased misappropriated by Appellant, was not made a party to this appeal.

3. CR 75.01 — Appellant has not filed a designation of evidence or proceedings stenographically reported, which is required to be filed within ten (10) days after filing a Notice of Appeal. It is impossible for this Court to review the actions of the trial court during the two weeks of trial without a transcript, and Appellant's failure to designate the stenographically recorded proceedings is grounds for dismissal of the appeal. *Johnson* v. *Maloney's of Olive Hill, Inc.*, 569 S. W. 2d 704 (1978).

4. CR 76.02 and 76.04 — This appeal has not been properly or timely perfected. The Appellant's Statement of Appeal was due 30 days after the Circuit Clerk's 75.07(5) notification on February 1, 1982. The Statement of Appeal prepared by Appellant's counsel contains a certificate of

service dated March 5, 1982, and was received by the Clerk of this Court on March 10, 1982. CR 76.02 is mandatory in requiring an appeal to be perfected by timely filing both the Statement of Appeal and the brief required by Rules 76.06 and 76.12. The undersigned has not received a copy of Appellant's brief and assumes one has not been filed, and pursuant to Rule 76.12(8)(b) the appeal may be dismissed.

5. CR 76.06 — The Statement of Appeal is in error in that it omits the indispensible parties set forth hereinabove and it also erroneously lists Louis Cohen as counsel for the Appellants, rather than as a party Appellant.

6. Strict compliance with Rules of Procedure regarding appeals is required. Failure to comply with the Rules is grounds for dismissal of an appeal. *Foremost Insurance Company* v. *Shepard,* 588 S. W. 2d 468 (1979).

(s) Bruce A. Niemi
Counsel for Appellees
400 Marion E. Taylor Building
Louisville, Kentucky 40202
582-2277

APPENDIX D

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025

MOTION FOR EXTENSION OF TIME

Comes the Appellant, by Counsel, and moves the Court to grant a reasonable extension of time to be determined by the Court for the Appellant to file a Designation of Record, pursuant to CR 75.01, and for the Clerk of Jefferson Circuit Court to certify the record on appeal in the above styled case and in support of this Motion states to the Court as follows:

1. The Appellant, pro se, originally attempted to effect an appeal directly to the Supreme Court of Kentucky. The Supreme Court of Kentucky remanded the above styled action to this Court for determination as to whether the Appellant should be permitted to prosecute her appeal in forma pauperis. During the pendency of these issues, the entire record of the proceedings in Jefferson Circuit Court were at the Clerk of the Supreme Court or at the Clerk's Office of the Court of Appeals.

2. This Court originally entered an Order on March 29, 1982 remanding the case to Circuit Court for a hearing to determine whether the Appellant should be permitted to prosecute her appeal in forma pauperis and for a determination as to the basis upon which the trial court ordered a supersedeas bond of $25,000.00 filed to secure the appeal.

3. This Order was subsequently withdrawn, and a second Order entered on April 14, 1982 denying the Appellant's Motion to proceed in forma pauperis.

4. The undersigned has had numerous conversations with the Office of the Clerk of the Court of Appeals in an attempt to seek a resolution of the procedural entanglements which have arisen as a result of the Appellant's appeal to the Supreme Court. The undersigned was advised by a clerk of the Court of Appeals that the record on appeal was to be transmitted back to the Clerk of Jefferson Circuit Court and that the Appellant should file a copy of the receipt for a $100.00 filing fee (a copy of which is attached hereto) and a Motion for Extension of Time for filing a Designation of Record as well as for an extension of time for the Clerk of Jefferson Circuit Court to certify the record on appeal.

WHEREFORE for the foregoing reasons the Appellant respectfully requests the Court to set a reasonable time for filing a Designation of Record on Appeal and for the Clerk of Jefferson Circuit Court to certify the record.

(s) Thomas E. Clay
Thomas E. Clay, P.S.C.
Attorney for Appellant
Mulhall, Turner, Hoffman, Clay
& Triplett
440 South Seventh Street, Suite 300
Louisville, Kentucky 40203
Phone: 584-6375

CERTIFICATE

I hereby certify that a copy of the foregoing was deposited in the United States Mail on the 5th day of May, 1982, and mailed to Bruce A. Niemi, Attorney for Appellees, 400 Marion E. Taylor Building, Louisville, Kentucky 40202; Wanda Wright Schaab, 6405 Shadow Wood Drive, Prospect, Kentucky 40059; Mr. Louis Cohen, Curator, 335 W. Market Street, Louisville, Kentucky 40202; and Honorable C. V. Sanders, Bullitt Circuit Court, Shepherdsville, Kentucky 40165.

(s) Thomas E. Clay
Thomas E. Clay

APPENDIX E

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025

RESPONSE TO MOTION FOR EXTENSION OF TIME

Come the Appellees, by counsel, and pursuant to CR 76.34(2) submit the following in response to Appellant's *Motion For Extension of Time.* Appellant's motion requests additional time to perform two procedural steps, designation of record and certification of record. Response will be made to each request.

I. APPELLANT HAS FAILED TO SHOW EXCUSABLE NEGLECT AND IS NOT ENTITLED TO EXTENSION OF TIME TO FILE A DESIGNATION OF RECORD.

Extensions of time for designation of record under CR 75.01 are governed by CR 76.40 and 6.02, which allows extension of time upon cause shown that failure to act

within the specified period was the result of excusable neglect. It is submitted that Appellant's motion does not contain the requisite showing of excusable neglect. Given the benefit of doubt as to the effect of the plethora of Appellant's pro se papers sent to the Clerk of this as well as the Supreme Court, and given the benefit of the stay mandated by *Gabbard* v. *Lair,* 528 S. W. 2d 675 (1975) when Appellant sought review of the trial Court's denial of Appellant's request to appeal in forma pauperis, when this Court entered its order on April 14, 1982 in File No. 82-CA-515-MR denying Appellant's petition, time began to run again an Appellant's appeal. The latest possible date under CR 75.01 for filing the designation of record was 10 days from the April 14 order. (This assumes that Appellant effected an actual "filing" pursuant to CR 79.06(6) of motions/appeals within ten (10) days of filing either Notice(s) of Appeal to stay an earlier running of the time limitations.) The fact that Appellant originally attempted to effect an appeal pro se is of no consequence in that she did have counsel of record on April 14, 1982, and as stated in *Johnson* v. *Maloney's of Olive Hill, Inc.,*

> ". . . the rules on designation are clear and straightforward, and there is no reasonable excuse for a responsible attorney's failure to file a timely and proper designation or to request an extension of time under CR 6.02 . . ."
>
> 569 S. W. 2d 704, 707

The period under CR 75.01 in which to timely request an extension of time is 10 days and Appellant having failed to do so and having failed to show excusable neglect, under *Johnson* the Appellant's motion must be denied, and the appeal dismissed.

II. THE TIME FOR CERTIFICATION HAVING EXPIRED AND THE CIRCUIT CLERK HAVING CERTIFED THE RECORD, APPELLANT'S MOTION FOR EXTENSION IS UNTIMELY AND IMPROPER.

The second part of Appellant's motion requests an extension of time for certification of the record and is governed by CR 73.08 which provides that the Appellate Court may, upon a showing of good cause, extend the time for certification of the record "if the motion for extension is made *before* the expiration of the period as originally prescribed or as extended by previous order." Although CR 75.07(4) places the responsibility upon the Appellant, the Jefferson Circuit Court Clerk did his job of timely certifying the record on February 1, 1982 within the period of 60 days from Appellant's filing of her first Notice of Appeal on December 29, 1981. In a somewhat analogous situation in which the Circuit Clerk certified the record prior to the filing of the transcribed testimony, this Court recognized the Appellant's responsibility under 75.02 and 75.07 and held that

> "The proper procedure would have been for Appellant to move, prior to certification, for an extension of time to certify the record. CR 73.08 Once the record had been certified prior to such a motion being made, Appellant's other recourse would have been a timely motion to correct pursuant to CR 75.08 on the grounds that the certification had been premature in that the transcript of the evidence was not yet filed. However as neither of these motions was made and Appellants motion for extension was filed . . . some 11 days late, Appellant's motion for extension of time is denied." *Department of Transportation* v. *Kemper*, 574 S. W. 2d 932 (1978).

The only possible stay of the running of time for the procedural steps in this appeal can be that afforded under the rule of *Gabbard* v. *Lair*, supra, as pointed out above, when Appellant filed her third Notice of Appeal on February 1, 1982 seeking review of the trial court's denial of her forma pauperis request. This is the same date the Circuit Clerk certified the record, and under *Kemper*, it was Appellant's duty to be aware that the transcript was not filed (indeed it had not been designated) and to either timely request an extension or move to correct the record.

To avoid any further confusion, a statement in Appellant's motion should be corrected. Appellant did attempt to have her appeal *transferred* to the Supreme Court of Kentucky, but that Court did not "remand" to this court for a determination on Appellant's forma pauperis status. By order entered February 12, 1982 in File No. 82-SC-45-I, the Supreme Court unequivocally denied Appellant's motion to proceed in forma pauperis on her sundry tendered motions including a "Motion for Transfer of Case from Court of Appeals to Supreme Court." Although CR 76.18 (3) provides that a motion for transfer suspends the running of time for further steps in the appeal the touchstone under the rule is "filing" of the motion, which must be within 10 days of filing the Notice of Appeal. The "filing of papers" is governed by CR 79.06(6) and although the Appellant sent a motion for transfer to the Clerk of the Supreme Court, same was returned on January 11, 1982 as not submitted within the time limit allowed and not received as tendered, *but not filed*, along with a motion to proceed in forma pauperis, until February 1, 1982. The significance of this is that Appellant's motion for transfer was never "filed", only tendered, and no suspension of time for accomplishing the procedural requirements of her appeal can be afforded.

CONCLUSION

In summary the Appellant's untimely motion for extension of time must be denied. Simply, the first notice of appeal was filed December 29, 1981, and an "Amended Notice of Appeal" was filed January 12, 1982. Appellant's designation of record under CR 75.01 was due in ten days, and nothing was timely filed to stay or extend these deadlines. The Circuit Clerk certified the record on February 1, 1982 and Appellant did not timely move to extend or correct the certification. The third Notice of Appeal filed February 1, 1982 raised only the forma pauperis issue and was decided by this Court on April 14, 1982. Even if the running of time was stayed from February 1 through April 14, and Appellant had another 10 days to file a designation of record, that time has expired without extension and Appellant has not made the requisite showing of excusable neglect.

(s) Bruce A. Niemi
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APPENDIX F

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

MOTION FOR RECONSIDERATION

Comes the Appellant, by Counsel, and moves the Court to reconsider its Order of June 10, 1982, dismissing the above-styled action on the grounds that the Order does not specify with sufficient clarity grounds for the dismissal, and in support of the motion, states as follows:

1. On June 10, 1982, the Court entered an Order dismissing the appeal with a notation "no response to the motion having been filed." At present Counsel for the Appellant believes that the reason the appeal was dismissed was the filing of the effective Notice of Appeal by the Appellant, pro se. In view of the Appellant's demonstrative propensity for suing attorneys and judges, the undersigned would respectfully request the Court to specify the grounds for dismissing the appeal.

2. The undersigned has also filed a motion with the Court to withdraw as counsel of record which the Court denied as moot in its June 10, 1982 Order. The undersigned respectfully submits that should the Court not permit the Appellant to pursue her appeal, she will seek relief from the Supreme Court of Kentucky. Consequently, the under-

signed will be left as counsel of record, and the appeal will not be exhausted.

WHEREFORE, for the foregoing reasons, the undersigned respectfully requests the Court to amend its Order of dismissal to reflect the specific grounds for the dismissal and to permit him to withdraw as counsel for the Appellant.

(s) Thomas E. Clay, P.S.C.
by (s) J.M.G.
Attorney for Appellant
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APPENDIX G

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

MOTION TO RECONSIDER

Comes the Appellant, by Counsel, and moves the Court to reconsider its decision to dismiss this appeal and deny her previous motion for an extension of time.

The Appellant believes that the primary reason for this Court's decision to dismiss the appeal was her failure to bring all of the mandatory parties before the Court. The Appellant's specific grounds for appeal are that the Appellees also failed to bring those same necessary parties before the Circuit Court and in her pro se attempts at making this appeal she followed the pattern already set up by Appellees in the original Circuit Court suit.

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APPENDIX H

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - *Appellees*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025

RESPONSE TO MOTION FOR RECONSIDERATION

Come the Appellees, by counsel, and in response to Appellant's Motion state as follows:

1. Although captioned "Motion for Reconsideration," the motion filed by Appellant's counsel of record, Thomas E. Clay, does not request the Court to reconsider or modify its Order of June 10, 1982, but requests only specification of the grounds for the Court's ruling dismissing the appeal. Considering the entertainment of such a request to be purely within the Court's discretion the undersigned does not object, however, Appellees would request that any such specification relate back to the date of the Court's Order of June 10, 1982 and that the finality of this action not be further delayed.

2. As to Mr. Clay's Motion to Withdraw, same is indeed moot. The existence of a "counsel of record" has no

consequence or significance upon any subsequent appellate proceedings which appellant may initiate.

(s) Bruce A. Niemi
Counsel for Appellees
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582-2277

APPENDIX I

COURT OF APPEALS OF KENTUCKY

No. 82-CA-911-I

WANDA WRIGHT SCHAAB - - - - - *Appellant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - - *Appellees*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025

RESPONSE TO MOTION FOR RECONSIDERATION

Come the Appellees, by counsel, and in response to Appellant's MOTION TO RECONSIDER filed herein on June 25, 1982 state as follows:

1. The motion should be denied as not timely filed. By Order entered June 14, 1982, Appellant was given ten days to correct certain deficiencies and minimum filing standards for this motion. The final day for filing was June 24, 1982.

2. As to the merits of the motion, Appellant requests (without citing any authority) that her appeal not be dismissed for failure to include all necessary parties, because Appellant alleges that Appellees/Plaintiffs did not bring all the necessary parties before the Circuit Court. At numerous times the Appellant raised this allegation including a handwritten and oral *Motion to Dismiss* (T.R. 886-887) presented during trial. The trial court heard this motion,

outside the presence of the jury, and found that all necessary parties were in fact before the Court on the basis of their previous entry of appearance (T.R. 280-294) or their actual presence at trial. This hearing was stenographically recorded, however, because of Appellant's failure to file a designation under CR 75.01 the trial transcript is unavailable for review. The appeal was properly dismissed for failure to comply with CR 75.01 as well as omission of all necessary parties under CR 73.03.

(s) Bruce A. Niemi
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582-2277

APPENDIX J

SUPREME COURT OF KENTUCKY

File Number 82-SC-1043-D

WANDA WRIGHT SCHAAB - - - - - - *Movant*

v.

MARIE SCHAAB and
ARLENE M. GITTINGS - - - - - *Respondents*

Appeal From The Jefferson Circuit Court
Fifteenth Division
Hon. C. V. Sanders, Special Judge
79 CI-04025
Court of Appeals Number 82-CA-911-I

RESPONSE TO MOTION FOR DISCRETIONARY REVIEW

Come the Respondents, by Counsel, and in response to the issues of law advanced as grounds for discretionary review of the dismissal of Movant's appeal by the Court of Appeals, state as follows:

A. The Movant's Constitutional Right to Appeal Is Conditioned Upon Strict Adherence to the Rules of Procedure.

The Movant's assertion that the dismissal of her appeal violates her constitutional rights ignores the long held policy of this Court requiring strict compliance with rules of procedure regarding appeals. *Foremost Insurance Company* v. *Shepard*, Ky., 588 S. W. 2d 468 (1979). Respond-

ent's/Appellee's *Motion to Dismiss Appeal* pursuant to CR 76.34(6) set forth, in detail, seven specific Civil Rules with which Movant/Appellant had not complied in seeking Appellate review, any one of which dictates dismissal of the appeal. The Court of Appeals *Order* (Appendix A hereto) does not specify the reason for dismissal in that no response was filed, but also ruled upon in that Order was a *Motion for Enlargement of Time* in which to designate and certify the record filed by the Movant's/Appellant's then counsel of record. Attached hereto as Appendix B is a copy of the *Response to Motion for Extension of Time* as filed with the Court of Appeals which succinctly sets forth the procedural shortcomings which dictated the dismissal of the appeal, regardless of the omission of indispensable parties in Movant's Notices of Appeal.

B. All Necessary Parties Were Before the Circuit Court.

In her Motions to Reconsider, the Movant/Appellant advanced an argument now repeated that her appeal should not be dismissed for the omission of indispensable parties in her Notice of Appeal because of her claim that all necessary parties were not before the Trial Court. On page four of her Motion, the Movant acknowledges the ruling by the Trial Court that all necessary parties were before the Court. This ruling was made following a stenographically reported hearing held outside the presence of the jury on the fourth day of the two week trial when the Movant submitted a handwritten *Motion to Dismiss the Action,* Appendix C hereto (Record on Appeal, page 886). As pointed out above, the Movant failed to file a designation of stenographic record and failed to secure a transcript of the trial to be included in the record certified by the Circuit Clerk. It has long been the rule of Appellate review that evidence not transcribed and not included in the record is presumed to support and sustain the findings and rulings of the Trial

Court. *Tucker* v. *Tucker,* Ky., 398 S. W. 2d 238 (1966); *Richardson* v. *Bank of Hardinsburg,* 196 Ky. 589, 245 S. W. 138 (1922); *Massengale* v. *Lester,* Ky., 403 S. W. 2d 697 (1966).

The Trial Court ruled that all necessary parties, all the heirs of the deceased, were before the Court on the basis of their previous entry of appearance (Record on Appeal, pages 280-294) or their actual presence at trial. The Movant's/Appellant's right to review of that ruling as well as review of the jury's verdict was dependent upon her compliance with the applicable rules of procedure and the Court of Appeals correctly overruled her *Motions to Reconsider.*

CONCLUSION

The Movant has not advanced any compelling reasons for this Court to grant discretionary review and the Motion should be denied.

Respectfully submitted,

(s) Bruce A. Niemi
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